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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SECOND APPELLATE DISTRICT  
DIVISION FIVE

In re Z.B., a Person Coming Under  
Juvenile Court Law.

LOS ANGELES COUNTY  
DEPARTMENT OF CHILDREN  
AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

I.Q. et al.,

Defendants and Appellants.

B302529

(Los Angeles County Super.  
Ct. No. DK10225)

APPEAL from an order of the Superior Court of Los Angeles County, Stephanie M. Davis, Judge Pro Tempore. Conditionally affirmed.

Roni Keller, under appointment by the Court of Appeal, for Defendant and Appellant, I.Q.

Donna B. Kaiser, under appointment by the Court of Appeal, for Defendant and Appellant, D.B.

Mary C. Wickham, County Counsel, Kim Nemoy, Acting Assistant County Counsel, and Jacklyn K. Louie, Principal Deputy County Counsel, for Plaintiff and Respondent.

Mother I.Q. and father D.B. appeal from the termination of their parental rights to their daughter, Z.B. On appeal, mother contends the court erred in denying her petition for change of order under Welfare and Institutions Code section 388, and in failing to find she had established the parental bond exception under section 366.26, subd. (c)(1)(B)(i).<sup>1</sup> Father contends the court erred in its inquiry and notice obligations under the Indian Child Welfare Act (ICWA) (25 U.S.C. § 1901 et seq.). We remand for the limited purpose of ICWA compliance and otherwise affirm.

***FACTUAL AND PROCEDURAL BACKGROUND***

As the substantive issues on appeal relate to mother's visitation, her bond with the child, and whether their continued relationship is in the child's best interests, we focus our discussion of the facts and procedure on those issues.<sup>2</sup> As to mother, Z.B. was declared dependent because mother's untreated mental health needs limited her ability to provide regular care for the child.<sup>3</sup>

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<sup>1</sup> All undesignated statutory references are to the Welfare and Institutions Code.

<sup>2</sup> We will discuss the facts relating to ICWA in the discussion section of our opinion.

<sup>3</sup> In contrast, the child was declared dependent as to father due to his domestic violence towards mother. Father was arrested for burglary prior to the adjudication hearing. He received an eight-year sentence and remained in prison through the termination of his parental rights. His visitation and relationship with the child are not at issue in this appeal, and we do not discuss them further. Father's only appellate issue is ICWA compliance.

### **1. *Z.B.'s Half-Brother Josiah***

The story begins not with Z.B.'s birth, but with her older half-brother, Josiah G., who was born to mother in Connecticut in 2010.<sup>4</sup> Mother relocated to California in 2013, to escape domestic violence from Josiah's father.

A fact which would later become significant is that, in 2012, when still in Connecticut, mother reported to the Connecticut Department of Children and Families (Connecticut Department) that Josiah's maternal grandfather and his girlfriend had tried to poison Josiah. These allegations were unsubstantiated and the case was closed. In 2013, mother claimed that, back in 2011, she had seen maternal grandfather's girlfriend performing oral sex on Josiah, but had failed to report it. When mother finally contacted authorities, Josiah was too young for a forensic interview, but a physical examination was unrevealing, and the child showed no sexualized behaviors. At this point, the Connecticut Department questioned mother's credibility. The allegations were deemed unsubstantiated.

### **2. *The Initial Petition Based on Father's Domestic Violence***

Z.B. was born in December 2014 in California. On April 3, 2015, the Department of Children and Family Services (DCFS) filed a petition to declare Z.B. dependent based on multiple incidents of father's violence against mother. The child was detained from father and placed in mother's custody. Mother was given family maintenance services.

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<sup>4</sup> As Josiah was not father's child, and there were no allegations as to Josiah against mother, Josiah was not included in the dependency petition.

DCFS interviewed mother on May 22, 2015. Her home was neat and clean and both children appeared well cared for. Mother's statements during the interview were sometimes difficult to follow and her thoughts appeared disconnected. Mother apologized and expressed that she suffers anxiety when discussing her past history of domestic violence. Mother explained that she has PTSD and anxiety from the physical abuse, as well as a seizure disorder. She stated that she had previously taken psychotropic and anti-seizure medications, and had smoked marijuana to cope with some of the symptoms. But she had stopped marijuana and her medications when she became pregnant.

On October 29, 2015, in a last minute information for the court, DCFS recommended that the court appoint an expert for a mental health evaluation of mother. It does not appear that this ever occurred.

Both parents submitted on the petition and the child was adjudicated dependent, removed from father, and placed with mother under DCFS supervision. Mother's case plan included: a domestic violence victims' support group, parenting, and individual counseling to address issues of domestic violence.

**3. *Mother Takes Z.B. to Connecticut and the Connecticut Department Receives Two Neglect Referrals Against Her***

At some point mother left Josiah with a maternal aunt in Connecticut. In December 2015, Josiah sustained a serious fall in school, and mother returned to Connecticut with Z.B. Although mother informed DCFS that she and Z.B. would return to California in January 2016, she would not return until March,

after the DCFS social worker informed her that she was in violation of court orders.

DCFS would subsequently learn that, while mother had been in Connecticut, the Connecticut Department received two new referrals. The first was that mother was not following through with Josiah's mandated medical treatment and she was observed as easily agitated and smelling of marijuana. The second referral alleged that mother had been leaving her children in the care of a great-great-grandparent who was not capable of caring for them. After mother's family confronted mother about these circumstances, mother fled, taking Josiah from the maternal aunt in Connecticut and moving him to a different maternal aunt in Florida. The Connecticut aunt explained that when mother is being investigated by protective services, she moves Josiah to another relative to avoid government involvement. The maternal aunt was concerned about the children.

The maternal aunt in Florida, Tracie W., confirmed that she was taking care of Josiah. She had concerns about mother's health and stability at the time, and believed that she was not then capable of caring for Josiah. Josiah remained in Florida with Tracie W. throughout these proceedings.

#### **4. *Mother Returns to California in Crisis***

On March 25, 2016, mother presented herself at the DCFS office.

Upon mother's return to California, she was living in a hotel with Z.B. and a friend who acted as an In-Home Supportive Services Worker. Mother had a document, dated November 10, 2015, certifying her for in-home supportive services, due to her

“multiple medical problems” which included seizure disorder, brain trauma, sleep disorder, and PTSD.

**5. *Mother is Hospitalized Three Times***

On March 30, April 2, and April 4, 2016, mother had three separate hospitalizations. While admitted, she allowed her friend/supportive services worker to take care of Z.B. This was problematic because the friend was arrested for driving under the influence on April 1 – the day before mother’s second hospitalization.

On April 8, at DCFS’s request, mother drug tested. She informed the social worker that she would test positive for marijuana, which she did. She claimed that she smoked marijuana as an alternative treatment for her seizure disorder and other psychiatric problems. Mother explained that she took seven different medications, including psychotropics, and that her body could not handle them, so her doctor advised her to use the alternative treatment of smoking marijuana. She stated that her three recent hospitalizations were due to seizures. Mother agreed that her health had declined, and said that she needed to become stable so that she could care for her children.

**6. *The Supplemental Petition and Removal Order***

DCFS prepared a supplemental petition to declare Z.B. dependent on the additional basis that mother “has mental health needs requiring a treatment plan that includes the administration of psychotropic medication. Mother has failed to adhere to this plan and such failure limits her ability to provide

regular care for her child and further places her child at risk of harm.”<sup>5</sup>

The Department obtained a removal order without advance notice to mother – the Department was concerned that notice to mother would prompt her to flee with Z.B. Despite these measures, by the time DCFS attempted to execute the removal order, mother had left her hotel with no forwarding address.

**7. *Mother Disappears with Z.B. for Over Four Months***

On April 22, 2016, the court issued a protective custody warrant for Z.B. and an arrest warrant for mother. The child was detained at large. DCFS filed the supplemental petition, regarding mother’s untreated mental health needs, that same day. Z.B. was ultimately located by the Connecticut Department. On September 4, 2016, the California DCFS flew the child to California and placed her in a foster home. She appeared to be in good health.

It would later come out that, for some time, Z.B. had been living with maternal grandfather in Connecticut.<sup>6</sup> Mother had signed a document, drawn up by an attorney, granting him legal guardianship of Z.B., which maternal grandfather believed was legal. When directly questioned whether mother lived in his home, maternal grandfather stated that mother had given him custody and did not live there. He said that his attorney had told

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<sup>5</sup> The Department’s allegation of neglect due to mother’s marijuana use was later dismissed.

<sup>6</sup> The record is not clear how much time elapsed between mother’s flight from California and her placement of Z.B. with maternal grandfather.

him that she could not have the child or live in the home.<sup>7</sup> Z.B. had been happy, healthy, and thriving in maternal grandfather's home.

**8. *Z.B. is Adjudicated Dependent under the Supplemental Petition***

On October 19, 2016, Z.B. was adjudicated dependent under the supplemental petition. The juvenile court terminated the prior placement order and custody was given to DCFS for suitable placement. Mother's reunification services were similar to her prior family maintenance services, but now included a requirement that she attend mental health counseling and take all prescribed psychotropic medications. She was granted monitored visitation of two hours twice per week.

The court ordered DCFS to initiate Interstate Compact on the Placement of Children (ICPC) proceedings to consider placement of Z.B. with maternal grandfather in Connecticut and/or with Tracie W., the maternal aunt in Florida with whom Josiah was residing. Tracie W. would ultimately withdraw herself from consideration; we mention her ICPC proceedings only because it was uncertain whether Z.B. would be placed in Connecticut or Florida at this moment in time.<sup>8</sup>

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<sup>7</sup> Mother would later testify that she was living in maternal grandfather's home and personally raising Z.B. during this time.

<sup>8</sup> On appeal, mother suggests she was unable to visit Z.B. for the next nine months because she was in Connecticut. She claims that she was told that Z.B. was going to be placed in Connecticut, so she went to Connecticut to establish herself there in anticipation of the placement. This is belied by the record; it was not clear whether Z.B. would be placed in Connecticut or

**9. *The First Nine Months (Sept. 2016 – June 2017) – Mother’s Contact is Minimal***

Z.B. was placed in foster care when she returned to California in early September 2016. Z.B. was, at the time, not yet two years old. Although the juvenile court granted mother twice-weekly monitored visitation, she did not visit in person at all during this time. Instead, she remained in Connecticut.

For three months, mother did not even telephone the child. Once she did, in December 2016, the social worker attempted to set up a video chat. Incompatibility between the mother’s phone and the social worker’s phone delayed this process by a month. By mid-January 2017, the social worker was prepared to set up a video call via Skype, mother’s preferred application, but mother’s phone was no longer working. Mother’s phone was out of service until March 9, when she texted DCFS with her new number and apologized for not having communicated. Video visits were set up in March and occurred thereafter.

In April 2017, maternal grandfather’s ICPC was approved. In May 2017, mother claimed that she would move back to California.

**10. *The Next Six Months (July – Dec. 2017) – Z.B. Moves to Connecticut and Mother Begins Monitored Visitation***

DCFS was granted discretion to place the child with maternal grandfather, in the event mother did not return to California as promised. Mother remained in Connecticut, and

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Florida. Indeed, at one point, mother identified an additional individual in Florida she wanted considered for an ICPC placement. An ICPC proceeding was conducted for that individual.

the child was placed with maternal grandfather on July 31, 2017. The Connecticut Department was to facilitate monitored visits for mother.

Maternal grandfather monitored mother's visits. She visited twice per week for 2-3 hours at a time. Mother also phoned the child a few times each week. Maternal grandfather reported that mother was appropriate and affectionate with Z.B. Mother had begun individual counseling in April 2017 and enrolled in parenting classes in September 2017. Mother's visits were so successful that, by November 2017, maternal grandfather was reporting that mother was no longer in need of a monitor. Maternal grandfather believed that mother was stable and that Z.B. would be safe going home someday. Mother reported that she was not required to take any medication at this time.

**11. *January 2018 – Mother is Granted Unmonitored Visitation, Which is Briefly Successful***

On January 3, 2018, the court found mother's progress to have been substantial and continued her reunification services. She was granted unmonitored day visits. Mother had two unmonitored visits without incident. On February 14, 2018, it all fell apart.

**12. *February 14, 2018 – Mother Abducts Z.B.***

On the evening of February 13, 2018, mother picked up Z.B. for an unmonitored evening visit. The child had been to the pediatrician earlier that day with flu symptoms, so paternal grandfather told mother to have Z.B. home early to rest. Mother agreed, but did not comply. At 11:30 that night, she took the child to the emergency room, claiming maternal grandfather and his girlfriend had sexually abused and poisoned Z.B. – the exact

same unsubstantiated allegations she had made against them as to Josiah, years earlier.

An ER doctor explained there was no test he could run for poisoning. He conducted an initial exam of Z.B., and saw “no signs of trauma, rash or abuse to the genital or anal area.” The hospital consulted with the special response team, who felt there was no need to further the exam based on initial results. Mother was unsatisfied, and believed the male doctor was “covering” for maternal grandfather.

Later that morning, having not received the response she wanted, mother fled with the child from the hospital – despite being repeatedly told she was not discharged. Mother hid Z.B. from DCFS, the Connecticut Department, and Connecticut police for a couple days, until the police found them. During this time, mother was in telephonic contact with DCFS and Connecticut Department social workers, both of whom pleaded with her to return the child, but mother refused. She later admitted that she had been “confused and emotional and didn’t know what to do.” She also said that, while she was on the run, she and the child “hid in the woods for quite some time.”

The precise nature of the delusion under which mother was operating when she made the accusations and kidnapped the child was never made clear. However, the facts, including mother’s ever-changing explanations for her conduct, demonstrate mother’s grasp on reality during this time was tenuous at best, even if her intentions were protective of the child. Specifically, mother’s explanations for why she had suspected maternal grandfather and his girlfriend had sexually abused Z.B. varied among: (1) Z.B., who was later shown to have had insufficient verbal abilities, specifically told her that

maternal grandfather and his girlfriend had hurt her, put a penis in her butt, and blown smoke in her face until she passed out; (2) mother's concerns had actually been raised because she had fortuitously seen maternal grandfather's girlfriend with him when he had taken the child to the pediatrician, and the girlfriend was (according to mother) not permitted to be around Z.B.; and (3) her major concern was simply that Z.B. did not go to the bathroom during the visit, which had made her suspect sexual abuse.

The Connecticut Department investigated mother's claims of sexual abuse, and determined they were unfounded. The police investigation of mother's abduction of Z.B. resulted in charges against mother, for Risk of Injury to a Minor and Custodial Interference in the Second Degree. Mother was arrested.

### **13. *Mother Does Not Visit Until November 2018***

Mother's statements and behavior continued to be erratic. On April 3, 2018, she telephoned the DCFS social worker, saying that she was no longer incarcerated and wanted to see her child. When mother was informed that the charges were unfounded and Z.B. had been returned to maternal grandfather, she yelled, "My child told me what he did and is not a liar." Mother refused to listen or calm down.

Mother did not want maternal grandfather to monitor her visits. The feeling was mutual; maternal grandfather refused to monitor mother's visits and wanted nothing to do with her. The Connecticut Department also declined to monitor mother's visits "given the recent events that transpired." This posed a problem; DCFS could not find an adequate monitor.

On November 6, 2018, the DCFS social worker went to Connecticut to personally monitor mother's visit and continue to investigate options. During the visit, mother was appropriate and caring with the child.

**14. *Mother's Reunification is Terminated in January 2019***

On January 29, 2019, the court found mother's progress had been minimal and terminated reunification. Mother filed a notice of intent to challenge the termination of reunification by writ, but did not file a petition.

**15. *Mother Did Not Make Scheduled Phone Visits***

On April 24, 2019, the court ordered 3-way visitation phone calls. On May 9, 2019, mother agreed to a weekly phone schedule, but by July, she had failed to make any calls.

**16. *Mother Has a Flurry of Monitored Visits in July and August 2019***

With every other monitor option exhausted, DCFS had given mother a list of private monitors in Connecticut who would allow mother to self-pay.

All told, mother had five visits in July and five in August, with a private monitor, at the Connecticut Department office. The reports uniformly indicate that Z.B. was happy during the visits and expressed affection for mother. They also show that mother was always appropriate during visits, and demonstrated positive parenting techniques.

Mother's visits then stopped, although it is disputed why. The DCFS social worker stated, "there appears to have been an issue with the professional monitor and the child was beginning school." In contrast, mother testified that DCFS failed to return her telephone calls to set up additional visits.

**17. *Mother's Section 388 Petition***

On August 21, 2019, mother filed a section 388 petition, seeking return of Z.B. to her custody or a reinstatement of reunification services and liberalization of visits. Mother argued that changes she sought were in the child's best interests because Z.B. was well bonded to her and they had excellent visits. Mother's petition was supported by the private monitor's visitation reports of the July and August visits.

Mother also supported her petition with a letter from her therapist at Safe Futures. The therapist, who specialized in domestic violence survivor counseling, indicated that mother had attended 26 individual counseling sessions since she began attending in April 2017. Although mother had been attending counseling at Safe Futures for more than two years, her 26 counseling sessions were not evenly spaced and she had long periods without any counseling. During the critical period surrounding and following mother's abduction of Z.B. on February 14, 2018, mother went to counseling once in February 2018 (unknown date), once in April 2018, and had not yet returned by November 2018.

**18. *Combined Hearing on Mother's Section 388 Petition and Termination of Parental Rights***

On November 19, 2019, the court held a combined hearing on mother's section 388 petition and the termination of parental rights under section 366.26. Mother submitted a letter from her therapist which stated that mother "has remained positive and determined throughout this long and tedious process, and her

progress seems to be such that she is ready, willing, and able to provide a stable home for her daughter.”<sup>9</sup>

The only witness at the hearing was mother. She testified that she is not medically required to take psychotropic medication. Mother agreed that she has always struggled with mental health issues, specifically depression, anxiety and PTSD, and testified that she has worked on these issues in therapy. She testified that she was not presently on medication as she was not then dealing with depression or other issues that had plagued her in the past.

When asked to explain why she took Z.B. to the hospital on February 14, 2018, mother now offered an explanation different than what she stated at the hospital and to investigators: Z.B. had been experiencing pain between her legs and did not want mother to buckle the seatbelt in her car seat. Z.B. had also expressed that she was touched by someone. Mother knew something was wrong because her child was in pain, and since she could not determine the cause, she thought the best course of action was to take the girl to the hospital. On cross-examination, when asked whether her allegations against maternal grandfather were unfounded, mother said she was not sure. She volunteered that maternal grandfather had not sexually abused the child, but she still believed his girlfriend had.

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<sup>9</sup> In her brief on appeal, mother cites to this letter for the proposition that her therapist “found her to be a fit parent.” The therapist, who never monitored a visit or observed mother interact with Z.B. in any way, rendered no opinion on mother’s parental fitness, but simply commented on mother’s progress in therapy.

Mother denied that she had abducted the child, testifying that the nurse, the Connecticut Department, and the DCFS social worker had all told her she could take the child, and she had no idea that she had to return Z.B. until the police arrived.

As to her time spent raising Z.B. and creating a parental bond, mother testified that Z.B. resided with her “from birth until the day she was taken from [maternal grandfather’s] home and brought here by the Department.” She testified that she spent all day, every day, with the child for the first three years of her life. Mother claimed that, when she was first separated from Z.B., there were six months without visits because mother was establishing stability in Connecticut while waiting for ICPC approval of the child’s placement with maternal grandfather. She also testified how well her privately-monitored July and August 2019 visits had gone – a fact not disputed by DCFS.

Mother also admitted that, earlier in 2019, she had been arrested on a domestic violence charge, with a roommate listed as victim.

## **19. *Argument and Rulings***

### **A. *Section 388 Petition***

With respect to the section 388 petition, mother’s counsel argued that mother had “consistently and regularly attended counseling” and had “essentially completed a case plan and then some.” Counsel argued that mother “is finally at a place where she can really take care of her child,” and requested another six months of reunification services.

The court denied the petition. The court concluded mother’s counseling obligation was not completed because mother had not internalized the lessons from counseling. The court noted that the focus of mother’s counseling, from the very

beginning, had been on her experience as a victim of domestic violence, yet mother had recently been arrested for perpetrating domestic violence. The court expressed concern that mother's demeanor on the witness stand reflected a continuing mental health issue that needed to be addressed.

The court concluded that mother had not established that reinstating reunification services would be in Z.B.'s best interests. The court stated that mother has never acknowledged or taken responsibility for either the initial dependency findings against her or her behavior in February 2018 which defeated what had otherwise been successful unmonitored visitation.

*B. Termination of Parental Rights*

As to termination of parental rights, mother's counsel relied on the exception to termination in section 366.26, subdivision (c)(1)(B)(i). That subdivision provides an exception when termination would be detrimental to the child because the parents "have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship."

The court found the exception not established, and terminated parental rights. The court relied on all of the reasons for which it had denied mother's section 388 petition.

**DISCUSSION**

Mother contends the court erred in denying her section 388 petition and in concluding she had not established the bonding exception to termination of her parental rights. Father contends the court did not comply with its duties under ICWA. The parents join in each other's briefs.

**1.     *The Court Did Not Err in Denying Mother’s Section 388 Petition***

Mother contends the dependency court abused its discretion in denying her petition for modification under section 388. Section 388 provides, in pertinent part: “Any parent . . . may, upon grounds of change of circumstance or new evidence, petition the court . . . for a hearing to change, modify, or set aside any order of court previously made.”

The dependency court’s decision whether to modify its previous orders will not be disturbed on appeal unless an abuse of discretion is clearly established. (*In re Michael B.* (1992) 8 Cal.App.4th 1698, 1704.) The petitioner has the burden of proving by a preponderance of the evidence that the proposed change is in the best interests of the child. (*In re Michael D.* (1996) 51 Cal.App.4th 1074, 1083.) The petitioner must prove both changed circumstances and that the modification is in the best interests of the child. (*Id.* at p. 1086.)

The “best interests” analysis requires more than a simple comparison of the household and upbringing offered by the natural parent and the caretaker, here maternal grandfather. (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 529.) Other factors to consider include: “(1) the seriousness of the problem which led to the dependency, and the reason for any continuation of that problem; (2) the strength of relative bonds between the dependent children to *both* parent and caretakers; and (3) the degree to which the problem may be easily removed or ameliorated, and the degree to which it actually has been.” (*Id.* at p. 532.)

“[I]n order to prevent children from spending their lives in the uncertainty of foster care, there must be a limitation on the

length of time a child has to wait for a parent to become adequate.” (*In re Marilyn H.* (1993) 5 Cal.4th 295, 308.) “After the termination of reunification services, the parents’ interest in the care, custody and companionship of the child are no longer paramount. Rather, at this point ‘the focus shifts to the needs of the child for permanency and stability’ [citation], and in fact, there is a rebuttable presumption that continued foster care is in the best interests of the child. [Citation.]” (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317.)

The dependency court concluded mother did not establish a change of circumstance and did not demonstrate that reinstatement of reunification services was in Z.B.’s best interests. We agree.

Mother’s purported change of circumstances was that she had completed the equivalent of her required programs and was finally in a stable enough position to take care of Z.B. But she had not, and was not. Throughout Z.B.’s lifetime – and apparently before – mother struggled with mental health issues and taking the right combination of medications. At times, she had periods of relative stability; at others, her behavior was erratic and she was unable to care for her children. At the time of the section 388 hearing, the only change after the termination of reunification services, nearly ten months earlier, was that mother had attended a number of additional therapy sessions and visits. Mother testified that, at the time of the hearing, she was not bothered by her previously recurring symptoms. Yet she was unable to identify the circumstances that triggered a return of anxiety and PTSD symptoms and her loss of control, nor had she revealed any plan to obtain help in the event symptoms returned. More than three years had passed between the

adjudication of the petition against mother and the section 388 hearing. Despite the services mother had obtained during this time, she was no closer to permanent mental stability than she had been when Z.B. was detained.

A similar analysis applies to mother's assertion that continued reunification was in Z.B.'s best interests. Z.B. had established a stable home life with maternal grandfather, first in 2016, when mother attempted to transfer legal guardianship to him, and again on July 31, 2017, when Z.B. was placed with him in an ICPC placement. For over two years, Z.B. had permanence in his home – with the exception of one month, when mother's unfounded allegations of sexual abuse resulted in a temporary foster care placement. Undoing that permanence again, for a nearly five-year-old child, was not in Z.B.'s best interests.

Mother disagrees, arguing that her evidence was so strong, relief under section 388 was mandated. She specifically relies on the *Kimberly F.* factors, suggesting that (1) there never was a serious problem with her parenting requiring dependency; (2) she maintained an extremely strong bond with Z.B. throughout; and (3) she had successfully participated in services and could provide a safe, stable home for Z.B. Even assuming mother maintained a bond with Z.B., we conclude the trial court reasonably found lacking mother's evidence of the other two factors.

As to the first factor, mother asserts that no finding of parental unfitness had ever been made against her. This is untrue; the supplemental petition was adjudicated against mother; the court found that mother's failure to adhere to the treatment plan for her mental health needs "limit[ed] her ability to provide regular care for her child and further places her child at risk of harm."

As to the third factor, mother says that any problem has been resolved. As we have discussed, it has not. We find it significant that, even at the hearing, mother still refused to accept that she had done anything wrong by abducting Z.B. from the hospital – falsely claiming that the nurse, the Connecticut Department, and the DCFS social worker all told her that leaving with the child was permissible. Mother claims she has been “penalized for her natural and non-endangering responses to her well-founded concern for the safety of her child.” Mother’s response to her concern was neither “non-endangering” nor, as the Connecticut Department concluded, well founded. Taking her child to the emergency room with legitimate concerns is certainly appropriate. But fleeing the emergency room with the child risked the child’s health and safety. Rather than allowing the hospital and Connecticut Department to properly investigate her serious allegations, she was on the run with the child for several days, hiding from the police in the woods, while she was “confused and emotional and didn’t know what to do.” This was not “non-endangering” conduct; it was dangerous.

**2. *The Court Did Not Err in Terminating Parental Rights – Mother Did Not Establish the Bonding Exception***

**A. *Law of Termination of Parental Rights and Parental Bond***

Mother contends she established the parental bond exception with Z.B. that precludes the termination of her parental rights. A juvenile court at a section 366.26 hearing must select a permanent plan for the child. (§ 366.26, subd. (b).) Adoption is the permanent plan preferred by the Legislature for dependent children who are likely to be adopted if parental rights

are terminated. If the dependency court finds that a child should not be returned to his or her parent and is likely to be adopted, it must select adoption as the permanent plan unless it finds a “compelling” reason for determining that termination of parental rights would be detrimental to the child under one of several specified exceptions. (*Id.* at subd. (c)(1)(B).)

The exception to termination found in subdivision (c)(1)(B)(i) of section 366.26 provides that detriment may be found if “[t]he parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship.” There are two prongs to this exception: regular visitation and the child’s benefit from continuing the relationship. The regular visitation prong requires consistent visitation throughout the child’s detention. (*In re Melvin A.* (2000) 82 Cal.App.4th 1243, 1254.) It does not, however, “mandate day-to-day contact.” (*In re Casey D.* (1999) 70 Cal.App.4th 38, 51.)

B. *Standard of Review*

The appellate courts differ on the standard of review that applies to an appellate challenge to a juvenile court ruling rejecting a claim that the parental bonding exception applies.<sup>10</sup> In *In re Jasmine D.* (2000) 78 Cal.App.4th 1339, at page 1351, the court acknowledged that most courts had applied the substantial evidence standard of review to this determination. However, the court concluded that the abuse of discretion standard was “a better fit” because the juvenile court was obligated to make “a

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<sup>10</sup> The issue is presently pending before our Supreme Court. (*In re Caden C.* (2019) 34 Cal.App.5th 87, review granted July 24, 2019, S255839.)

quintessentially discretionary determination.” (*Ibid.*) Other courts have concluded both standards apply. The determination of whether a beneficial parental relationship exists may be more properly characterized as a factual one; there substantial evidence review applies. But there is also a second, discretionary determination – whether that relationship is a compelling reason for finding detriment to the child. This determination should be reviewed for abuse of discretion. (*In re Bailey J.* (2010) 189 Cal.App.4th 1308, 1314–1315.) We use the combined standard of review.

C. *The Court Did Not Err*

Mother, acknowledging her burden on appeal, argues that she has established both elements of the parental bonding exception as a matter of law, based on uncontradicted and unimpeached evidence.

The first element requires regular visitation and contact with the child throughout the removal process. Mother claims she has established this element and, where there has been inconsistency in her visitation, she blames circumstances beyond her control. Our review of the evidence is consistent with the juvenile court’s contrary finding.

After mother initially fled California with Z.B., the nearly two-year-old child was located and removed from her custody in early September 2016. With the exception of a single telephone call to the foster mother in October, mother did not even telephone the child until December 2016. Mother offers no explanation for her failure to contact her daughter during these months. There was also no contact for the next three months. Mother blames DCFS’s inability to set up Skype visits during this time; but at most DCFS’s technical problems are the cause for

only one of these months, the remaining period of no contact was caused by mother not having a functioning phone and her unwillingness to contact DCFS in any other way. In sum, for the first six months of Z.B.'s detention, mother failed to maintain anything approaching regular visitation and contact with her daughter. This, alone, is sufficient evidence to defeat mother's argument.

There were some other periods in which mother visited regularly (March 2016 through February 2018, and July and August 2019) and others in which mother claims she attempted to visit but could not do so for lack of a monitor. But there were also additional periods in which mother's failure to maintain regular contact with the child cannot be attributed to anyone but herself. From the time Z.B. was found by police on February 16, 2018, and mother's request to reestablish visitation on April 3, 2018, mother was incarcerated and did not telephone the child. An agreed-upon phone visitation schedule was established on May 9, 2019, but mother never called, nor did she request modification of the schedule to a more convenient time. After her privately-monitored visits stopped in August 2019, mother still did not establish phone visits – something she could have done at no expense.

The second element requires mother to establish not only sufficient evidence of a bond with Z.B., but a parental bond. Mother must establish that a parental bond is such that severing it would greatly harm the child. We agree with mother that her visitation monitor's reports reflect a bond with the child. And there is some evidence that the bond is, in some respects, parental in nature. But mother did not establish that severing the bond would cause great emotional harm to Z.B., and the trial

court did not abuse its discretion in concluding that it would not. The fact that the child was thriving in maternal grandfather's home even though mother's visitation and contact had stopped for months at a time evidences this. For whatever reasons, mother's contact with Z.B. was not consistent, and the child did not suffer in the absence of mother from her life.

### **3. *Remand for ICWA Compliance is Necessary***

ICWA presently imposes three separate duties on courts and social workers: (1) a duty of initial inquiry when proceedings begin; (2) a duty of further inquiry, upon reason to believe an "Indian child" is involved; and (3) a duty of notice to the tribe or tribes, upon reason to know an Indian child is involved. (*In re D.S.* (2020) 46 Cal.App.5th 1041, 1052.) Here, father initially argued that the court failed in its duty of further inquiry – an issue father concedes was resolved against the parent on similar facts in *In re Austin J.* (2020) 47 Cal.App.5th 870, 889. In his reply brief, father argues there is insufficient evidence that DCFS conducted a proper initial inquiry. We agree.

#### **A. *ICWA Facts and Proceedings***

Prior to Z.B.'s initial detention from father, mother represented that she had Cherokee ancestry, but was not registered with a tribe. At the time of the detention hearing, mother submitted an ICWA initial notice form, in which she checked the box stating, "I may have Indian ancestry," and identified the tribe as Cherokee. The following month, father filled out his form, also checking the "I may have Indian ancestry" box and identifying Cherokee as the tribe. The form also included the name and city of Z.B.'s paternal grandfather, as a relative who may have further information. On May 26, 2015, the court stated that it had reason to believe the child was an

Indian child within the meaning of ICWA and ordered DCFS to conduct further investigation on both mother's and father's side.<sup>11</sup>

The social worker interviewed both parents, although the social worker's report does not specifically mention interviewing the parents as to Indian heritage. In its June 5, 2015 report, DCFS simply stated that ICWA may apply, and identified the possible tribes as Cherokee and Mashantucket Pequot.

The record is silent as to any additional investigation. At the October 29, 2015 adjudication hearing, the court indicated that it did not have a reason to know Z.B. was an Indian child, and did not order notice.<sup>12</sup> The court indicated the parents were to keep DCFS, their counsel, and the court aware of any new information relating to possible ICWA status. No further information was submitted. The court reconfirmed its finding

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<sup>11</sup> As we will discuss, the ICWA statutes and regulations have changed since this hearing. The court's "reason to believe" finding in May 2015 was under prior law.

<sup>12</sup> Recognizing the significance of October 29, 2015 hearing to his ICWA argument, father sought to augment the appellate record with the reporter's transcript of the hearing. The request was granted, but the reporter could find no notes for that hearing, so no transcript was prepared. It is the appellant's burden to provide an adequate record that demonstrates reversible error. (*In re K.R.* (2018) 20 Cal.App.5th 701, 708.) But ICWA presents a unique situation, in which parents are acting as surrogates for the tribes in raising compliance issues. We agree that appellate review of "procedures and rulings that are preserved for review irrespective of any action or inaction on the part of the parent should not be derailed simply because the parent is unable to produce an adequate record." (*Ibid.*)

that ICWA did not apply at subsequent hearings, including the November 19, 2019 termination of parental rights from which father appeals.

B. *The Revised Statute Applies*

Federal ICWA regulations were amended in 2016. Effective January 1, 2019, California made conforming amendments to its statutes implementing ICWA. (*In re D.S.*, *supra*, 46 Cal.App.5th at p. 1048.) When a parent appeals from an adverse ICWA determination at the termination of parental rights, that appeal is an appeal only of the ICWA ruling at termination; it does not encompass the court's earlier unappealed ICWA rulings. (*In re A.M.* (2020) 47 Cal.App.5th 303, 319–320.) In such an appeal, the law in effect at the time of the termination hearing governs. (*Id.* at pp. 320–321.)

Here, father appeals the ICWA determination made at the November 19, 2019 termination hearing. The amended ICWA statutes, effective January 2019, apply.

C. *The Initial Inquiry Was Not Conducted*

We review a challenge to the Department's inquiry into a child's Indian ancestry for substantial evidence. (*In re Rebecca R.* (2006) 143 Cal.App.4th 1426, 1430.) The initial inquiry "includes, but is not limited to, asking the child, parents, legal guardian, Indian custodian, extended family members, others who have an interest in the child, and the party reporting child abuse or neglect, whether the child is, or may be, an Indian child and where the child, the parents, or Indian custodian is domiciled." (§ 224.2, subd. (b).) On this record, there is insufficient evidence that the initial inquiry obligation was satisfied. The trial court ordered DCFS to conduct further investigation of both parents' claims of native ancestry. There is no evidence this was done.

No DCFS report shows which, if any, relatives were asked about Indian heritage. Indeed, although the Department's June 5, 2015 report mentions Mashantucket Pequot, in addition to Cherokee, as the child's possible tribe, it does not identify which person identified that tribe or the reason for that person's belief the child may be Mashantucket Pequot.

The minute order following the adjudication hearing states that the court found no reason to know the child was an Indian child, but with nothing in the DCFS reports providing a basis for this finding and no reporter's transcript, we are left with a silent record which cannot support the court's finding. To be sure, there is no express requirement that the Department document its ICWA compliance; but the Department cannot omit information from its reports and then claim the sufficiency of its efforts cannot be challenged because the record is silent. (*In re K.R.*, *supra*, 20 Cal.App.5th at p. 709.) We therefore remand to give the Department an opportunity to document its ICWA compliance and, if it cannot do so, to conduct the necessary inquiry.

### **DISPOSITION**

The order denying mother's section 388 petition is affirmed. The order terminating both parents' parental rights is conditionally affirmed. The matter is remanded to the juvenile court with directions that if the Department is unable to demonstrate that it satisfied the duty of initial inquiry under ICWA, it shall conduct such inquiry and file documentation of its efforts. Based on the information obtained by such inquiry, the court shall determine whether further inquiry and/or notice is required. If notice is required and a tribe responds that Z.B. is

an Indian child, then the order terminating parental rights shall be vacated, and further proceedings conducted under ICWA.

RUBIN, P. J.

WE CONCUR:

MOOR, J.

KIM, J.